LIBRARY
SUPREME COURT, U. S.

FILED
SEP 21 1973
MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

No. 73-523

OCTOBER TERM, 1973

WARNER MAX ALEXANDER,

Petitioner,

v.

ALTON OCHSNER MEDICAL FOUNDATION, OCHSNER CLINIC, DR. KENNETH MEYER, DR. HURST B. HATCH, JR. AND DR. JOSEPH K. BRADFORD,

Respondents.

PETITION FOR CERTIORARI TO THE SUPREME COURT OF LOUISIANA IN No. 53,656 OF THE DOCKET OF SAID COURT, ENTITLED AS ABOVE

GEORGE M. LEPPERT,
408 Security Homestead Bldg.,
New Orleans, La.

Attorney for Petitioner.

INDEX

	PAGE
OPINIONS BELOW	1
JURISDICTION	2
QUESTIONS PRESENTED	2
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	3
STATEMENT OF THE FACTS	4
REASONS FOR GRANTING THE WRIT	10
CERTIFICATE	14
APPENDIX A—Memorandum decision by Louisiana Supreme Court	15
APPENDIX B—Opinion by Louisiana Court of Appeal	16

Authorities

STATUTES:

Seventh Amendment, U.S. Constitution	3
Fifth Amendment, U.S. Constitution	3
Article 2164 Louisiana Code Civil Procedure	3

Cases

Denver Rockets v. All Pro Management Inc. 325 F.S. 1049	11
Marsha B. Healy et al v. Hon Edwin Edwards, Gov. et al, Fifth Cir. No. Civil Action 73-688	12
Ross v. Bernhard, 90 S. Ct. 733, 396 U.S. 531, 24 L. Ed 2d 729 (1970)	10
Webster v. Offshore Food Service, 434 F. 2d 1191, cert. den. 92 S.Ct. 44, 404 U.S. 823	11

In the
Supreme Court of the United States

No. _____

OCTOBER TERM, 1973

WARNER MAX ALEXANDER,

Petitioner,

v.

ALTON OCHSNER MEDICAL FOUNDATION, OCHSNER CLINIC, DR. KENNETH MEYER, DR. HURST B. HATCH, JR. AND DR. JOSEPH K. BRADFORD,

Respondents.

PETITION FOR CERTIORARI TO THE SUPREME COURT OF LOUISIANA IN No. 53,656 OF THE DOCKET OF SAID COURT, ENTITLED AS ABOVE

Petitioner, Warner Max Alexander, prays that a writ of certiorari issue to the Supreme Court of Louisiana to review the judgment, opinion and decree of that Court rendered on June 29, 1973 in the above entitled cause.

OPINIONS BELOW

The opinion of the Supreme Court of Louisiana, a memorandum decision, was reported in 279 So.2d 695. Said decision was in connection with denial of certiorari to the Louisiana Court of Appeals for the

Fourth Circuit, in proceedings entitled as above and reported in 276 So.2d 794. The memorandum decision by the Supreme Court in denying writs of certiorari is set forth in Appendix A, while the opinion of the Court of Appeal is set forth in Appendix B.

JURISDICTION

The order or judgment of the Louisiana Supreme Court was entered on June 29, 1973. (See Appendix A) This petition for certiorari was filed within 90 days from said date. Jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1257 (3)

QUESTIONS PRESENTED

1. WHETHER OR NOT, IN A SUIT FOR DAMAGES FOR BREACH OF IMPLIED WARRANTY AND MEDICAL MALPRACTICE, THE INSTRUCTION BY THE JUDGE THAT THE JURY MUST RELY SOLELY UPON THE TESTIMONY OF MEDICAL EXPERTS IS A VIOLATION OF PLAINTIFF'S SEVENTH AMENDMENT RIGHT TO TRIAL BY JURY.

2. WHETHER OR NOT THE LOUISIANA SYSTEM OF JURY TRIAL IN CIVIL CASES IN WHICH THE APPELLATE COURT CAN RE-EXAMINE FACT ISSUES RESOLVED BY THE JURY, IS A DENIAL OF THE RIGHTS TO A JURY TRIAL UNDER THE SEVENTH AMENDMENT OF THE FEDRAL CONSTITUTION.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Seventh Amendment to the Constitution:

AMENDMENT [VII.]

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.

The Fifth Amendment to the Constitution:

AMENDMENT [V.]

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Article 2164 of the Louisiana Code of Civil Procedure:

Art. 2164. Scope of appeal and action to be taken; costs

The appellate court shall render any judgment which is just, legal, and proper upon the

record on appeal. The court may award damages for frivolous appeal; and may tax the costs of the lower or appellate court, or any part thereof, against any party to the suit, as in its judgment may be considered equitable.

STATEMENT OF FACTS

As will be noted below, it is our contention that the jury instruction given by the trial Judge here amounted to a denial of trial by jury as well as denial of due process of law. In order to appreciate the full thrust of a certain phase of those instructions, it is necessary to delve rather deeply into the medical problem involved. We therefore quote from the Court of Appeal opinion the medical history of the case: (as set forth in that opinion at page 766, Col. 1 of 276 So. 2d):

> On April 20, 1967, plaintiff was admitted to the defendant hospital by defendant, Dr. Hatch, who had found that the plaintiff was suffering from a spontaneous pneumothorax, a condition in which air has escaped from the lung into the space between the lung and the chest wall as a result of the rupture of a blister on the surface of the lung. This condition had first manifested itself on April 13, 1967, when plaintiff complained to Dr. Hatch that two days prior thereto he had an onset of stabbing pain in the mid sternal region, aggravated by breathing and by changing his position from lying prone. The doctor, on the basis of X-ray studies, diagnosed a 10% pneumothorax and prescribed bed rest and medication. Plaintiff was told to return in a week or sooner if his condition worsened. When he returned on

April 20, 1967, and X-ray studies revealed that the condition had worsened Dr. Hatch consulted with defendant, Dr. Kenneth Meyer, of the Surgery Department of Ochsner, whereupon the two physicians concurred that it was necessary to conduct a surgical procedure known as a thoracotomy.

This procedure performed by Dr. Meyer consists of the insertion of a catheter through the wall of the chest and into the space between the lung and the interior chest wall so that air can be aspirated from that pleural space. As the air is removed the lung re-expands and becomes sealed with the result that the leakage of air from the lung is gradually eliminated. The insertion of the tube is accomplished by means of a local anesthesia being administered, followed by an incision in the chest, the slant of which controls the direction to be followed by the catheter. A steel trocar or needle tube containing the catheter itself is then used to penetrate the chest muscle and chest wall. When the desired position is reached the trocar is removed leaving the catheter in place with the outside end of the catheter then connected to a suction apparatus.

This procedure was carried out at 4:30 PM on April 20, 1967. *The nursing notes show that on April 21 at 12:45 PM plaintiff was complaining of severe pain above the site of the insertion in the chest and "cannot move legs, arms or head without pain."* Dr. Meyer testified that when this report came to his attention he examined the plaintiff, finding that he was able to turn and move with ease as he was requested to do in

order for him to carry out his examination. *A chest X-ray was taken and thereafter the position of the catheter was changed. The doctor explained that by this time most of the air in the pleural space had been removed but there was still fluid on the periphery of the space.* The tube had to be repositioned in order to place one of the holes in the tube in the particular space where the fluid was located. He explained that in addition to the hole on the end of the catheter additional holes were placed in the catheter so as to make the removal of the air more effective. Plaintiff was seen by Dr. Hatch daily while in the hospital until May 1. By April 30 he felt that there was no more leakage from the lung so that the catheter could be removed, but on consultation with Dr. Meyer it was decided to leave the catheter in place for a short while longer. On May 1 Dr. Hatch's responsibility for the plaintiff was assumed by defendant, Dr. Bradford, to whom it was apparent by May 2 that plaintiff's lung had re-expanded completely, so that it was time for the catheter to be removed from his chest, and this was confirmed by X-ray examination.

Inasmuch as we are seeking a writ of certiorari on a matter of national interest, we shall not pursue the Louisiana Court of Appeals as it meanders down the labyrynthine ways of confusion, half truth and downright mistatement of facts, except insofar as may be necessary to mount our main attack, i.e. upon:

(a) The denial of petitioner's right to trial by jury as guaranteed by the Seventh Amendment to the Constitution of the United States;

(b) **The unique Louisiana jury system whereby, as a cold reality, the jury does not have the traditional role of judges of the facts, but are merely permitted to "play" with the facts as a child would with a toy, ever subject to having its toys taken away by the appellate court.**

The focal point of our attack in the trial Court, the Court of Appeal and in the State Supreme Court, was the failure of the battery of treating doctors at Ochsner Clinic to take proper lateral X-rays in positioning the catheter. As stated in our application for rehearing in the Court of Appeal:

> "Dr. William Leon, a witness called by the Plaintiff, examining the X-rays showing the tube inserted in Mr. Alexander's chest on April 20, and maintained there until May 3, 1967, in his testimony (Tr. 64-66) stated that (Tr. 66),
>
> > "Unless we had a view which had shown the chest in a lateral position, we can't tell where this is. It may be in the front or back. There is no way to tell.

Dr. Leon was testifying in answer to a question, about why the tube was inserted in the position shown in the X-ray he was examining, instead of in a higher position as it had at first been inserted, according to testimony given.

The record in the Alexander case presently discusssed before this court, reveals no such lateral X-ray had been taken, nor had any other techniques in aid of following, locating and positioning the tube inserted

through the trocar in the procedure of reducing the spontaneous pneumo-thorax.

Dr. Bradford, discussing the insertion of the catheter in the procedure such as was performed (Tr. 204-5) testified that the tube is inserted "blindly."

The Plaintiff-Appellant contends in this case that if the additional techniques had been appplied while the procedure was performed, the defendants would have been able to watch just where the tube was going and thereby exercise more effective control of it in its placement to carry out the procedure of reducing the pneumo-thorax."

The Court of Appeal indulged in some semantic ballet dancing reminiscent of Nijinsky, suggesting that plaintiff was suing on a theory of an implied contract whereby it was claimed that the doctors employed had GUARANTEED SUCCESS. These diversions, however, are beside the main issue here and we shall not pursue them because they will not stand inspection.. Such clumsy maneuvers are not calculated to deceive a reasonably bright mongoloid idiot. But the following double entrechat by the Court of Appeal must fall flat on its face when the Court declares: (at page 798 of 276 So.2d, col. 2)

> Plaintiff attempts to contradict this testimony by suggesting that X-ray photographs taken by Drs. Hatch and Meyer were inadequate in that they did not reveal the depth into the chest cavity which the catheter reached. He speculates that this caused his suffering. Dr. Leon thoroughly discredited this theory as a cause for plaintiff's prob-

lem. Plaintiff's argument that additional X-ray photographs should have been taken and that additional procedures, such as fluoroscoping and other tests, should have been implemented is not supported by any testimony, medical or lay. The real nub of the plaintiff's position seems to be that he was in pain at the beginning and continued to be in pain at the time of the trial; therefore, a breach of contract was committed by defendants who had undertaken to treat him, but the law does not exact upon the physician a guarantee to cure anyone."

From the passage above quoted from our petition for rehearing in the Court of Appeal it is clear that the Court is dead wrong in saying that Dr. Leon did not support our theory.

It is indeed true that a distinguished battery of medical experts, ranging from a neurosurgeon to an internist and some psychiatrists rallied round the Ochsner Clinic defense with an enthusiasm reminiscent of Davey Crockett at the Alamo. In this case, however, Davey Crockett and his mates won, thanks to the firepower of the "charge" which the trial Judge gave the jury. Thus, the trial Judge told the jury:

"I charge you that in matters such as this, you *must be guided by the views and opinions of experts as members of the medical profession as to whether or not the defendants, Alton Ochsner Medical Foundation or Ochsner Clinic, Dr. Kenneth Meyer, Dr. Hurst B. Hatch, Jr. and Dr. Joseph K. Bradford did all that they were required to do, * * * etc.*"

"I further charge you that whether or not

> the defendants treated Mr. Alexander within the standard of care of the New Orleans community is a matter that *must be proven by expert medical testimony.* If all experts testify that they did follow the standards of care in the New Orleans community, then you must render a verdict for the defendants, Alton Ochsner Medical Foundation, Ochsner Clinic, Dr. Kenneth Meyer, Dr. Hurst Hatch and Dr. Joseph Bradford."

By the foregoing emphasized language the trial Judge clearly told the jury that, in judging the fact issue of proper medical care, *they could not decide this fact for themselves,* despite the existence of substantial evidence which caused the common sense issue of proper care. He flatly told them that they *must be bound* by the conclusions of the experts. It is our contention that the above, along with the peculiar control over jury trials in Louisiana exercised by appellate courts, is a denial of Seventh Amendment rights to trial by jury, as well as a violation of other constitutional guarantees, such as due process and equal protection of the laws.

REASONS FOR GRANTING THE WRIT

There is a growing body of law relative to impairment by the States of the right to trial by jury. In *Ross v. Bernhard,* 90 S.Ct. 733, 396 U.S. 531, 24 L. Ed 2d 729 (1970) this Court held that where equitable and legal claims are joined in the same action a jury trial could not be denied on the legal claims.

The following recent cases, involving summary judgment, held that the granting of same did not

amount to a denial of the constitutional guarantee of a jury trial:

Webster v. Offshore Food Service, 434 F2d 1191, cert. denied 92 S.Ct. 44, 404 U.S. 823;

Denver Rockets v. All Pro Management, Inc. 325 F.S. 1049.

Of course, the posture of the parties when a case is dismissed via summary judgment is radically different than here, for, when the Court grants a summary judgment the basis for same is laid out in the record for all the world to see and the appellate court can rule, on the face of the papers, whether or not the summary judgment was properly granted.

But when, as here, the trial Judge by means of a mandatory instruction covertly takes from the jury their traditional role as the finder of facts, the whole package "goes upstairs" disguised as a jury verdict case despite the fact that the jury had nothing to do with the fact finding but meekly submitted to the clobbering by the trial Judge when he told them they had to decide the fault issue on the testimony of medical expert testimony alone. By a process of reductio absurdum, therefore, if what was done here could be carried to its logical extension a hospital patient could have his throat slit by a surgeon in an argument over dalliance with the doctor's wife, a battery of medical experts could swear in unison that slitting of the throat was standard procedure for lowering blood pressure, and the patient's heirs would not get a dime in damages because the trial court would have told the jury that,

in matters of due care etc. in medical matters, they *must take* the word of the experts.

The situation is made even worse in Louisiana in that here the appellate court, either the Supreme Court or the intermediate appellate court, has a full review of the facts. Thus, even if it were obvious to all common sense minds that there had been some dirty work at the cross roads in the trial court, the appellate court, whether Supreme or intermediate, could brush the entire mess under the rug by simply finding, as a matter of fact that what was done at the hospital was good medical practice anyway.

Thus, we say, Louisianans are certainly in a precarious position quo ad their supposed right to a real trial by jury. Moreover, this technique of virtually denying a trial by jury by means of a mandatory charge as vicious as the one here, is a matter of national interest. In malpractice cases it is difficult enough to secure the services of a medical expert to testify to the faults of his professional brethren. If this sort of heavy handed instruction as to how the jurors must decide the key fact issues is allowed to stand then it will not be long before we see a bumper crop of such maneuvers pop up throughout the land.

The jury system of Louisiana is already under national attack. In an unreported Fifth Circuit case[1] it has been held that the Louisiana jury system is constitutionally defective in that women are not selected for

[1] *Marsha B. Healy et al. v Hon. Edwin Edwards, Governor et al.*, CA 73-688.

jury service unless they volunteer. The Attorney General of Louisiana has obtained from this Court a stay order but it does seem that a writ issued now would clean up the entire jury problem in lovely Louisiana where Evangeline waited so long and so fruitlessly for her lover Gabriel, and where her modern day citizens are still waiting patiently for a real jury trial.

For the foregoing reasons we respectfully submit that a writ of certiorari should issue to the Supreme Court of Louisiana, that the judgments below be reversed and that a new trial be ordered.

GEORGE M. LEPPERT,
408 Security Homestead Bldg.,
New Orleans, La.
Attorney for Petitioner.

CERTIFICATE

I, George M. Leppert, hereby certify that I am a member in good standing of the bar of the Supreme Court of the United States that all of the statements of fact in the foregoing petition are true and correct and that copies of same have been served upon all opposing parties and upon the Clerk of the Supreme Court of Louisiana, properly addressed and postage prepaid on Sept. _____ 1973.

George. M Leppert

Appendix A

Supreme Court of Louisiana

NEW ORLEANS, 70112

WARNER MAX ALEXANDER : June 29, 1973

v.

ALTON OCHSNER MEDICAL FOUNDATION, ET AL : No. 53,656

In re: Warner Max Alexander applying for certiorari or writ of review to the Court of Appeal, Fourth Circuit, Parish of Orleans

---

Writ denied. On the facts found by the Court of Appeal, there is no error of law.

/s/ PFC
/s/ JWS
/s/ FWS
/s/ AT Jr.

MARCUS, J., recussd.

A TRUE COPY
Clerk's Office
Supreme Court of Louisiana
New Orleans, June 29, 1973

/s/ PHIL TRICE

Deputy Clerk

Appendix B

WARNER MAX ALEXANDER	: No. 5363
V.	: COURT OF APPEAL
ALTON OCHSNER MEDICAL FOUNDATION, ET AL	: FOURTH CIRCUIT
	: STATE OF LOUISIANA

APPEAL FROM THE CIVIL DISTRICT COURT FOR THE PARISH OF ORLEANS, STATE OF LOUISIANA, No. 507-100, HONORABLE WALTER F. MARCUS, JR., JUDGE

PATRICK M. SCHOTT

(Court composed of Judges William V. Redmann, James C. Gulotta and Patrick M. Schott)

A. S. CAIN, JR., CHARLES J. LANGE, and DEAN A. ANDREWS, JR.
Attorneys for Plaintiff-Appellant

ADAMS AND REESE (Henry B. Alsobrook, Jr.)
Attorneys for Defendants-Appellees

April 3, 1973 AFFIRMED

The plaintiff appeals from a judgment dismissing his suit against Alton Ochsner Medical Foundation, Ochsner Clinic and three physicians associated with those entities, Dr. Kenneth Meyer, Dr. Hurst B. Hatch, Jr. and Dr. Joseph K. Bradford. The case was tried to a jury resulting in a unanimous verdict for the defendants.

In his petition, plaintiff alleged alternatively that the defendants, including the three physicians named, as well as other physicians associated with them, in the period between April 20, 1967, and May 5, 1967, violated an agreement made with him in that the treatment afforded him was not performed in accordance with the standard of professional skills and care prevailing in the community and were negligent in that they failed to exercise ordinary care and skill required of them. In this Court, plaintiff contends that the defendants failed to use various processes and facilities to minimize his pain during the course of their treatment, thereby failing to render to him treatment which the community has a right to expect and thereby violating an implied warranty existing between plaintiff as a patient and defendants.

In addition, plaintiff complains that the trial judge's instructions to the jury were defective as a matter of law, because of, 1) the judge's failure to give certain special charges submitted by plaintiff's counsel and, 2) the inclusion of one particular paragraph in the general charge.

Plaintiff's counsel did not object to the general charge in the trial court so that he is precluded from that assignment of error in this Court under the provisions of LSA-C.C.P. Art. 1793. As to the trial judge's failure to give the special charges submitted by plaintiff, about which timely objection was made, a review of the general charge satisfies us that the jury was correctly and adequately instructed on the law in the context that the trial judge has the respon-

sibility to avoid confusing the jury and the right to use whatever semantics may be appropriate and necessary for this purpose. *Lauro v Travelers Insurance Company*, 261 So.2d 261, 4th Cir. 1972.

On April 20, 1967, plaintiff was admitted to the defendant hospital by defendant, Dr. Hatch, who had found that the plaintiff was suffering from a spontaneous pneumothorax, a condition in which air has escaped from the lung into the space between the lung and the chest wall as a result of the rupture of a blister on the surface of the lung. This condition had first manifested itself on April 13, 1967, when plaintiff complained to Dr. Hatch that two days prior thereto he had an onset of stabbing pain in the mid sternal region, aggravated by breathing and by changing his position from lying prone. The doctor, on the basis of X-ray studies, diagnosed a 10% pneumothorax and prescribed bed rest and medication. Plaintiff was told to return in a week or sooner if his condition worsened. When he returned on April 20, 1967, and X-ray studies revealed that the condition had worsened Dr. Hatch consulted with defendant, Dr. Kenneth Meyer, of the Surgery Department of Ochsner, whereupon the two physicians concurred that it was necessary to conduct a surgical procedure known as thoracotomy.

This procedure performed by Dr. Meyer consists of the insertion of a catheter through the wall of the chest and into the space between the lung and the interior chest wall so that air can be aspirated from

that pleural space. As the air is removed the lung re-expands and becomes sealed with the result that the leakage of air from the lung is gradually eliminated. The insertion of the tube is accomplished by means of a local anesthesia being administered, followed by an incision in the chest, the slant of which controls the direction to be followed by the catheter. A steel trocar or needle tube containing the catheter itself is then used to penetrate the chest muscle and chest wall. When the desired position is reached the trocar is removed leaving the catheter in place with the outside end of the catheter then connected to a suction apparatus.

This procedure was carried out at 4:30 PM on April 20, 1967. The nursing notes show that on April 21 at 12:45 PM plaintiff was complaining of severe pain above the site of the insertion in the chest and "cannot move legs, arms or head without pain." Dr. Meyer testified that when this report came to his attention he examined the plaintiff, finding that he was able to turn and move with ease as he was requested to do in order for him to carry out his examination. A chest X-ray was taken and thereafter the position of the catheter was changed. The doctor explained that by this time most of the air in the pleural space had been removed but there was still fluid on the periphery of the space. The tube had to be repositioned in order to place one of the holes in the tube in the particular space where the fluid was located. He explained that in addition to the hole on the end of the catheter additional holes were placed in the catheter so as to make the

removal of the air more effective. Plaintiff was seen by Dr. Hatch daily while in the hospital until May 1. By April 30 he felt that there was no more leakage from the lung so that the catheter could be removed, but on consultation with Dr. Meyer it was decided to leave the catheter in place for a short while longer. On May 1 Dr. Hatch's responsibility for the plaintiff was assumed by defendant, Dr. Bradford, to whom it was apparent by May 2 that plaintiff's lung had re-expanded completely, so that it was time for the catheter to be removed from his chest, and this was confirmed by X-ray examination. The catheter was removed on May 4 and plaintiff was discharged from the hospital on May 5 with no problems of mobility. Dr. Meyer and Dr. Bradford both testified that the procedure followed, and the treatment administered, was in accordance with standard medical practice in the City of New Orleans. Dr. Bradford further testified that Drs. Hatch and Meyer both have the necessary training and skill to have treated plaintiff.

In his petition, plaintiff alleged that it was during this period of hospitalization that the defendants failed him in some contractual obligation and were negligent in their treatment of him. He contends that he suffered severe pain and discomfort during this period; that somehow the defendants were derelict in their duty to alleviate his suffering; that this suffering continued after his discharge from the hospital and eventually caused him to lose his employment and to continue to suffer all the way up until the time of the trial.

Plaintiff did not testify at the trial except to

identify his doctor and hospital bills, and the only evidence of his suffering is contained in the testimony of the doctors as they recited from their records the complaints made to them by plaintiff.

The jury heard the testimony of ten different physicians who testified at the trial of the case. Dr. Hatch who had been treating plaintiff since April, 1962, for various illnesses including tuberculosis, continued to treat the plaintiff after the thoracotomy until March of 1969. Because of continued complaints throughout this period he prescribed medication, had him examined by and consulted with other physicians, including Dr. Merrill Hines, and became convinced that plaintiff's pains were psychogenic and suggested that he see a psychiatrist for treatment. This view was shared by Dr. Meyer on the basis of plaintiff's behavior in the hospital.

Dr. Hines had treated plaintiff over a period of 10 or 15 years as his family physician and also felt that plaintiff had emotional problems and recommended psychiatric treatment.

Plaintiff was examined by Dr. Charles L. Brown, Jr., on May 19, 1969, and upon initial examination of plaintiff followed by complete tests in the Baptist Hospital in July, 1969, and consultation with a neurologist, an orthopedic surgeon and a lung specialist, could find no explanation for the complaints and concluded that plaintiff's problems were emotional requiring psychiatric treatment. Dr. Brown reviewed the records of the Ochsner Clinic and the work done by Drs.

Hatch, Bradford and Meyer, and concluded that nothing they had done indicated any deviation from the proper medical care.

Plaintiff was treated by Dr. William Leon from December 2, 1969, until February 26, 1971. Plaintiff was given tests at Touro Infirmary, Dr. Leon consulted with an internist, Dr. Joseph Schenthal, and a neurosurgeon, Dr. Raeburn Llewellyn, but could find no objective findings to explain plaintiff's subjective complaints of chest pains, which plaintiff told him had been occurring for two and a half years since his pneumothorax. Dr. Leon, too, felt that plaintiff should get psychiatric care, and he testified that based upon the history that plaintiff had given to him, as well as the review he made of the medical records, he could find no dereliction of duty or breach of the standard of care or of medical practice on behalf of defendants.

Dr. Schenthal who examined plaintiff on January 5, 1970, and in October, 1971, testified that he could find no physical reason to account for the pain about which plaintiff complained. In his opinion the pain was involved with emotional components requiring the attention of a psychiatrist. In his opinion, Drs. Hatch and Bradford were "topnotch" in their fields, as well as Dr. Brown and others at the Ochsner Clinic who had examined plaintiff.

Dr. Llewellyn, who examined plaintiff on January 6, 1970, testified that the exposing of the nerves in the chest wall by the procedures followed during the thoracotomy were not the basis of plaintiff's com-

plaints. He could not find what was causing plaintiff's pain.

Plaintiff did see Dr. Millard Jensen, a psychiatrist, on March 23 and April 4, 1971, who testified that plaintiff was suffering from a great deal of anxiety, he was under stress, and he had paranoid tendencies. He felt that the pain he described was psychogenic in origin, especially since the other physicians could not find any physical reason for the pain. He recommended further psychiatric help but plaintiff stated that he didn't need any help in that area, and his attitude was that he knew what his problem was and that surgical correction was the only answer for the problem.

Finally, Dr. George Welch, a specialist in internal medicine, examined the plaintiff on August 6, 1971, and expressed the opinion that the pain about which plaintiff was complaining was not related to the treatment he got at Ochsner Clinic and was psychogenic or emotional in origin.

With respect to plaintiff's position that the defendants committed a breach of contract, we are guided by the following principles enunciated in *Phelps v Donaldson*, 243 La. 1118, 150 So.2d 35:

> "We think the general rule universally obtaining on the subject matter is that: 'When a physician undertakes the treatment of a case he does not guarantee a cure, nor is any promise to effect a cure or even a partial healing to be implied, nor does the law raise from the fact of employment

> an implied undertaking to cure, but only an undertaking to use ordinary skill and care. For this reason a physician cannot be held up to a standard of civil responsibility similar to that of engineers, mechanics, and shipbuilders. Of course a physician might contract specifically to cure and he would be liable on his contract for failure, but, in the absence of such a special and peculiar contract, the fact that treatment has resulted unfavorably does not even raise a presumption of want of proper care, skill, or diligence. * * *' 21 R.C.L. Sec. 36, p. 391. Also, see 70 C.J.S. Physicians and Surgeons § 57, pp. 981, 982 'A dentist, like a physician or surgeon, is not an insurer or guarantor of results, in the absence of express agreement.' 41 Am. Jur., Physicians and Surgeons, Sec. 104, p. 219."

There is no evidence of any expressed contract to cure. The testimony of defendant physicians standing alone is sufficient in this case with respect to implied warranty to show that they did use ordinary skill and care and their testimony is corroborated by the testimony of every other physician who reviewed their procedures and approved of same. Plaintiff attempts to contradict this testimony by suggesting that X-ray photographs taken by Drs. Hatch and Meyer were inadequate in that they did not reveal the depth into the chest cavity which the catheter reached. He speculates that this caused his suffering. But Dr. Leon thoroughly discredited this theory as a cause for plaintiff's problem. Plaintiff's argument that additional X-ray photographs should have been taken and that additional procedures, such as fluoroscoping and other

tests, should have been implemented is not supported by any testimony, medical or lay. The real nub of the plaintiff's position seems to be that he was in pain at the beginning and continued to be in pain at the time of the trial; therefore, a breach of contract was committed by defendants who had undertaken to treat him, but the law does not exact upon the physician a guarantee to cure anyone. Furthermore, the pain and discomfort described in the nursing note of April 21 are fully explained by Dr. Meyer who testified that a thoracotomy necessarily causes a patient to be uncomfortable as long as the catheter remains inserted and discomfort continues even after the patient is discharged from the hospital because of the incision and irritation to the lining of the lung and chest wall. Finally, the testimony of almost every physician who appeared at the trial, as well as numerous consultants to whom reference was made by those physicians, compels a conclusion that plaintiff's pain was not the result of defendants' actions but was psychogenic or emotional requiring psychiatric treatment for a cure.

As to the allegations of negligence on the part of defendants, their conduct must be judged on the basis of whether they exercised that degree of skill and care which is usually possessed and exercised by practitioners of the profession in the same community, it being their duty to use reasonable care and diligence along with their best judgment in the application of their skill to the case before them. *Uter v Bone and Joint Clinic*, 249 La. 851, 192 So.2d 100, and *Meyer v St. Paul Mercury Indemnity Company*, 225 La. 618

73 So.2d 781. When this test is applied to the conduct of defendants, the evidence is overwhelming to the effect that all of the physicians who are named defendants, as well as those personnel of Ochsner Clinic and the other entities who treated plaintiff, discharged their duty to him.